IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-190

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a Witness,

ISADORE H. BELLIS,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEONARD SARNER,
LOUIS LIPSCHITZ,
208 Six Penn Center Plaza,
Philadelphia, Pa. 19103
Counsel for Petitioner.

International Printing Co., 711 So. 20th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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MISCELLANEOUS.

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OPINIONS BELOW.

The opinion of the District Court and its final written contempt order are not reported (App. A1-11). The opinion of the Court of Appeals (App. A13-16) is reported in — F. 2d — (decided 7/9/73).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1973 (App. A17). The order of the Court of Appeals denying the petition for rehearing was entered on July 20, 1973 (App. A18). The jurisdiction of this Court rests on Section 1254 of the Judicial Code.

QUESTION PRESENTED.

Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury Subpoena Duces Tecum, of financial books and records of the partnership in his rightful possession.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED.

Amendment V.

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE.

This case presents the question as to whether partnership books and records are ever protected from compulsory production on Fifth Amendment self-incrimination grounds.

The facts material to the question are not in dispute and are set forth by the Court below as follows (App. A14-15):

The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969.

The partnership also had about six additional employees. Petitioner was the senior partner and personally supervised the work of the bookkeeper. The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the Petitioner's possession.

Petitioner was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Petitioner appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the district court to compel the Petitioner to produce the books and records described in the subpoena. The Petitioner confined his claim to his Fifth Amendment privilege.

The District Court ruled that since the documents were partnership papers, they were not subject to Petitioner's personal privilege. It then, under 28 U. S. C. Section 1826, ordered Petitioner held in contempt until he should produce the books and records sought (App. A11).

The Court of Appeals affirmed, stating that it was satisfied that the privilege against self-incrimination was not to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members, although it also recognized that the decision of this Court in *United States v. White,* 322 U. S. 694 (1944) seems to lay down a more involved test (App. A15-16) .

REASONS FOR GRANTING THE WRIT.

The Decision Below Conflicts With the Decision of This Court in *United States v. White*, 322 U. S. 694 (1944), in Deciding an Important Question in the Administration of the Revenue and Criminal Laws on Which the District Courts Are Divided and for Which There Is No Precedent in the Decisions of the Courts of Appeal.

This Court has never directly decided whether the constitutional privilege against self-incrimination applies to books and records of a small closely held partnership (App. A5). It has decided that the books and records of the individual proprietor are protected (*Boyd v. United States*, 116 U. S. 616 (1896); *Couch v. United States*, 41 U. S. L. W. 4106 (1973)); that those of a corporation are not (*Hale v. Henkel*, 201 U. S. 43 (1906); *Wilson v. United States*, 211 U. S. 361 (1911)); and that for unincorporated associations or members of a collective group the test for denying the privilege is whether (*United States v. White, supra* at p. 701):

> one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

In the thirty odd years since *White* denied the privilege to the records of a labor union, this notion of size, imper-

sonality and other circumstances have all been involved in the cases reaching this Court for decision as to the extent to which Fifth Amendment rights may be asserted with respect to business documents which might incriminate a member of an unincorporated association. Thus, although this Court has seemed to stress the question of whether the papers are held in a "representative capacity" on behalf of a "collective group" by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them" (*McPhaul v. United States*, 364 U. S. 372, 380 (1960) (concerned with the Civil Rights Congress); *Curcio v. United States*, 354 U. S. 118, 122-123 (1957) (Labor Union); *Rogers v. United States*, 340 U. S. 367 (1951) (Communist Party); *United States v. Fleischman*, 339 U. S. 349 (1950) (Joint Anti-Fascist Refugee Committee)), the impersonal nature of each organization involved made it clear that no Fifth Amendment privilege pertained to the books and records themselves and the issues before the Court in no way involved the question of whether the books and records were themselves protected, but rather whether the witness had to explain where they were (*Curcio, Rogers*) or whether he was in possession of them at the time the subpoena to produce was served (*McPhaul, Fleischman*).

However, a number of District Courts have had to squarely face the question of whether books and records of a small, closely held partnership are "outside the private domain walled by the Fifth Amendment" (App. A5), and have divided on the issue,[1] with only two cases in the Courts

1. Compare *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y., 1966); *United States v. Slutsky*, 73-1 U. S. T. C. § 9186 (S. D. N. Y., 1972); *United States v. Lawn*, 115 F. Supp. 74 (S. D. N. Y., 1953); *Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Calif., 1948); *United States v. Linen Service Council*, 141

of Appeals, both of which easily met the impersonality test of the large enterprise of *White*, discussing the problem.[2]

The Court below disregarded the functional approach of *White* as to size and impersonality and applied a talismanic test to deny automatically the application of the privilege to books and records of any partnership regardless of size solely by reason of the separate legal identity of the partnership (App. A15-16). In so doing, it ignored *Boyd v. United States*, 116 U. S. 616 (1896) from which case stems the development of the Constitutional protection afforded books and records from compulsory production and which itself involved a subpoena directed to a partnership

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1. (Cont'd.)
F. Supp. 511 (D. N. J., 1956); *United States v. Brazely*, 268 Fed. 59 (W. D. Pa., 1920) holding the books and records of the small personal partnership to be within the protection of the Fifth Amendment, with *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Co.*, 345 F. Supp. 410, 431 (E. D. La. 1972); *United States v. Onassis*, 125 F. Supp. 190 (D. D. C. 1954); *United States v. Onassis*, 133 F. Supp. 327 (S. D. N. Y., 1955); *United States v. Quick*, 336 F. Supp. 744 (S. D. N. Y., 1972); *In Re Grand Jury Subpoena Duces Tecum*, (D. Md., Civil No. 72-292-B, April 23, 1973) holding that they are not.

2. *In Re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA 3, 1971) and *United States v. Silverstein*, 314 F. 2d 789 (CA 2, 1963). In *Mal Brothers*, the entity employed 200-250 persons a year, with an annual payroll in excess of a million dollars and receipts in excess of two million dollars a year, excluding joint ventures with other companies, owned equipment of approximately one million dollars, with none of the partners being engineers of familiar with the accounting and bookkeeping end of the business. *Silverstein* involved a general partner of five limited partnerships having limited partners numbering from about 25 to 147 and a capitalization of upwards five million dollars, with the managerial general partner working with other peoples' money under defined delegations of authority and responsibility. In addition, the case of *United States v. Warnes*, 157 F. 2d 797 (CA 5, 1946), cited in *Silverstein*, involved a subpoena issued to an officer of various corporate and unincorporated organizations, with the Fifth Amendment privilege denied without any meaningful discussion as to the nature of the organizations.

for which a general partner was entitled to refuse to produce documents incriminating in content, and the teachings of *Couch v. United States, supra,* that with co-ownership and rightful, peaceful possession vested in Petitioner, Government compulsion by enforcing the subpoena against the person of Petitioner must be denied.

In *White,* this Court, had it wanted to, could easily have stated that when more than one person engages in a joint enterprise, the privilege is lost and is allowed only for the sole proprietor. That this Court contemplated that people could associate as partners or jointly with others in a common enterprise and still have the protection of the Fifth Amendment privilege is evident from the use of the plural "constituents" in the impersonality test set forth above, when the Court said that

> a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its *constituents,* but rather to embody their common or group interests only (italics supplied).

By the use of the plural instead of the singular, this Court did and intended to indicate that small organizations such as the intimate association of members of a small law firm continue to embody and represent the purely private or personal interests of the constituents rather than the common or group interests only.

The decision below, if allowed to stand, has far reaching and continuing implications on Constitutional protection afforded books and records from compulsory production in the administration of the Internal Revenue and criminal laws. The use of the small partnership or joint enterprise entity to engage in business and business trans-

actions is legion. The suggestion that books and records are said to be within the ambit of Fifth Amendment witness privilege only when he is a sole proprietor, and then regardless of the size or capitalization of his enterprise or the number of his employees, serves no meaningful purpose. The instant case presents an appropriate occasion for this Court to define the limits to which the Internal Revenue Service and the criminal arms of the federal and state governments may compel production of books and records of closely held, unincorporated partnerships and associations in accordance with the dictates of this Court in the *White* and *Boyd* cases.

CONCLUSION.

The decision below is incorrect. There is conflict with the pronouncements of this Court in *White* and *Boyd*. The occasion is appropriately presented for this Court to define the realistic confines of the application of Fifth Amendment protection to compulsory production of books and records of small partnerships and organizations which continue to embody and represent the purely private or personal interests of the constituents rather than common or group interests only. The petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

LEONARD SARNER,
LOUIS LIPSCHITZ,
Counsel for Petitioner.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MISC. NO. 73-95.

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, A WITNESS

MEMORANDUM OPINION.

VANARTSDALEN, *J.* May 16, 1973

This opinion is made to set out more fully the reasoning of the court with regard to the bench order issued on May 10, 1973.

On May 1, 1973, Isadore H. Bellis was served with a federal grand jury subpoena directing him to appear before the federal grand jury and bring with him certain books and records, specifically "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969."

Mr. Bellis appeared before the grand jury on May 9, 1973, and at that time refused to produce the books and records listed in the subpoena, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. The witness was brought before this court on May 9, 1973 for hearing. A full hearing was held on that date and was continued over and completed on May 10, 1973. At the conclusion of the hearing an order was entered, directing the witness to produce the records sought in the subpoena, limited however by excluding from the demand any client files.*

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* See *infra,* p. 9 for further discussion of scope.

The subpoenaed documents, partnership records of the law firm of Bellis, Kolsby & Wolf for the years 1968 and 1969, are in the possession of the witness, having been removed from the offices of Bellis, Kolsby and Wolf by Mrs. Harriet Lippman, secretary to Mr. Bellis, and brought to the offices of Mr. Bellis' present firm.[1]

Possession of the records, by the witness, has therefore been established.

The witness has filed a motion to quash the subpoena, asserting as justification for his resistance:

> A. The privilege which he claims is available to him as a former member of the partnership in question;
>
> B. That the partnership papers that Isadore H. Bellis is alleged to have withheld are his personal and private papers and entitle him to assert his rights under the Constitution of the United States as aforesaid;
>
> C. That these are not impersonal records and may contain private testimonial and personal information, disclosure of which may be in violation of his rights as aforesaid;
>
> D. That he has all of the rights of ownership and possession and that no one is authorized to waive any of his personal rights nor does anyone have any rights superior to his.

The privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution, "has often been stated by this Court and need not be elaborated." *Couch v. United States,* — U. S. —, 41 U. S. L. W. 4107, 4109 (1973) (citations omitted).

1. N. H. — [The transcript has not yet been prepared.]

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States,* 228 U. S. 457, 458 (1913). (*Id.*) (emphasis in original).

Generally, a bare assertion of privilege is insufficient. There must be some showing of entitlement beyond mere assertion. Possible incrimination need not be *conclusively* shown, but rather that it appears from all the circumstances that an answer would either directly incriminate the witness or provide a link in the chain of evidence which, taken as a whole, could incriminate him. Here, the witness claims that he is privileged from producing books and records. If the subpoena, on its face, indicates susceptibility to production on an impersonal basis, the burden would shift to the witness to demonstrate the personal nature of the documents to the witness to demonstrate the personal nature of the documents to remove them from the power of the subpoena. Since, as is set out more fully below, there is no personal privilege in corporate or other impersonal records, even if they would incriminate the custodian, once the nonpersonal nature is apparent, the burden must logically shift to the witness to overcome the showing.

However, construing the claim of privilege[2] in a light most favorable to the witness, I will follow, *arguendo,*

2. The court was concerned about a possible problem of incrimination incident to the removal of the records from the offices of Mr. Bellis' former partners. It was conceivable to the court that if the removal were unauthorized, the witness might be subject to prosecution in state court for theft or embezzlement. Therefore I called this problem to the attention of counsel. No claim of privilege vis-a-vis *this* question is before the court, since no such claim was made. The witness is of course an attorney himself and was ably represented by two distinguished attorneys.

United States v. Cogan, 257 F. Supp. 170, 172 (S. D. N. Y. 1966), which held that

> the burden of demonstration is upon the Government when it claims that a man's papers, because he shares their ownership with others, are outside the private domain walled by the Fifth Amendment.

Applying that principle to the facts of this case, the burden would be on the government to show that the sought-after documents are not the personal or private papers of the witness. That burden has been met, as the following discussion shows, and the efforts of the witness to argue against that conclusion, in actuality, only serve to enforce it.

The partnership in question, Bellis, Kolsby & Wolf, until its dissolution in 1969, was a law partnership composed of "three law partners, one fulltime attorney-employee, occasionally a parttime attorney-employee, a receptionist-telephone clerk and three secretaries." (Memorandum in support of motion to quash, at 2). In addition, the services of an independent accountant were retained N. H.*).

It has long been recognized that a corporation may not invoke a Fifth Amendment privilege as to corporate records even if the production of those records would tend to incriminate the custodial officer, *Wilson v. United States,* 221 U. S. 361 (1911), and even if the corporation has been dissolved. *Wheeler v. United States,* 226 U. S. 478 (1913). In *United States v. White,* 322 U. S. 694, 701 (1944), the privilege was denied to a labor union and the Court promulgated the following "test":

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organi-

* See n. 1, *supra.*

> zation has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

In the thirty-odd years since *White*, the Court has not passed on the question whether the records of a partnership are "outside the private domain walled by the Fifth Amendment". *Cogan, supra. Cogan* notwithstanding, it appears by the weight of lower court authority that they are.

The question was carefully considered in *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (3rd Cir.), *cert. denied*, 404 U. S. 857 (1971). In that case a partner's claim of privilege was overruled, on the basis of the *White* test:

> The intimation in *White, supra*, that the privilege of asserting the 5th Amendment might be dependent upon the degree of impersonality of the organization asserting it must be deemed not essential to the core of the decision and the test that it makes requisite.
>
> Following *White* the Supreme Court has routinely denied the 5th Amendment privilege to unincorporated associations without discussion of size, impersonality or other circumstances. (citations omitted).
>
> However, when we examine the findings of fact made by the court below, we can clearly see that they were not erroneous and that even if we accept the impersonality test, this entity contravenes it by reason of the fact that the court found that the entity employed 200 to 250 persons a year with an annual payroll in excess of $1,000,000; that its annual receipts

were approximately $10,000,000 a year excluding joint ventures with other companies; and that it owned equipment valued at approximately $1,000,000. Further, none of the partners in the entity were engineers or were familiar with the accounting and bookkeeping end of the business.

In our judgment, it is essentially clear that the defendants here had all the aspects of a corporate enterprise and that there was nothing personal or private in connection with the papers solicited from them under the subpoena herein. There can be no rational basis for upholding a claim to 5th Amendment protection to conduct a business operation as a personal rather than a corporate operation. (*Id.* at 618).

Production has also been upheld in *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Corp.*, 345 F. Supp. 410, 431 (E. D. La. 1972).

However, the most recent and most compelling examination of the problem is found in *In Re Grand Jury Subpoena Duces Tecum*, — F. Supp. — (D. Md. 1973) (Civ. No. 72-292-B, April 23, 1973) (Opinion of Blair, J.). In that case Judge Blair was faced with a question on all fours with the one presently before this court.[3] Judge Blair stated the issue as follows:

> That is, whether, under the facts here present, a partner in a law firm has such a personal interest in the files of that firm so that he may assert his Fifth Amendment privilege against self-incrimination as a bar to the involuntary production of these files. This court concludes he may not. (Opinion at 5).

3. It should also be pointed out that Judge Blair was faced with the same paucity of record which faces this court (Opinion at 17-18).

After discussing the development of the privilege from the early cases, the court stated that it was

> unable to agree with those cases which look to size as the most important criterion in determining the personality of an organization. Therefore, it does not agree with the movant's position that a law firm having four partners is a small personal organization merely because it has only four members. A careful reading of *White* indicates to this court that the considerations which influenced the Supreme Court in reaching its decision transcend notions of size and are equally applicable to all organizations, both the large and the small. (*Id.* at 11).

The reasoning is eminently sensible. Starting from the premise that the privilege is entirely personal, and, in the above-quoted words of Mr. Justice Holmes, protects a person "from producing the evidence but not from its production", it is plainly evident that the records in this case are beyond the pale of the personal privilege. An appropriate analogy can be drawn from *Couch, supra.* In that case it was held that the personal records of a taxpayer, delivered to her accountant, were subject to a subpoena directed to the accountant and that the taxpayer could not assert a personal privilege in them, even though, had she herself retained them, a privilege would lie. In the present case, even though the witness may have included certain personal records or personal information in the partnership records, this fact alone does not render the records subject to the protection of a purely personal privilege. As was pointed out in *United States v. Onassis,* 133 F. Supp. 327, 332 (S. D. N. Y. 1955):

> If [a partner] has voluntarily included certain admissions within the records of the partnership, by so doing

> he placed these admissions beyond his power to suppress and within the control of each of his seven partners to treat as partnership property as well as to inspect and copy. (footnote omitted).

Therefore, once Bellis inserted personal data into the partnership records, he lost control over, and expectation of privacy in, such data just as effectively as Couch did in turning over personal records to her accountant. He cannot now be heard to claim a privilege in something which he long ago exposed to the eyes of his partners and accountant.

It is, therefore, appropriate to hold that the records of the law partnership of Bellis, Kolsby & Wolf are not personal records and are, therefore, subject to subpoena. The principles of *White* and *Mal Brothers* point in this direction and the holding of *In re Grand Jury Subpoena Duces Tecum* conclusively demonstrates it. It comes down to a basic question of whether or not to exalt form over substance, and so stated, there can be only one answer as taught by the cases. The records must be produced.

Bellis also contends that since the records are in his ownership and possession, the effect of production would be to compel him to incriminate himself. *Couch, supra* lends the witness no support. Primarily these records are those of the partnership, and the mere fortuitous (or deliberate) insinuation of the records into the possession of the witness in no way changes this fact. The records, once having been partnership records and, therefore, owned in common,[4] remain so even after dissolution and are still subject to subpoena. *Wheeler v. United States, supra.* Although the government strongly urged the rationale of a "superior right" argument, citing *United States v. Egenberg,* 443 F. 2d 512 (3rd Cir. 1971), such an argument, while possibly sound if we view this witness as possessing papers

4. *Cf.* 59 P. S. § 52.

of a third party (the partnership) for a temporary agency purpose (custodial possession), is unnecessary since it is of paramount significance that, right of possession or no right of possession, the papers are not personal except for certain parts which were at one time, but have long since lost any claim to "personality", having been once included in the impersonal partnership records. Reliance by the witness on *United States v. Cohen*, 388 F. 2d 464 (9th Cir. 1967), is misplaced. Even if Cohen were to be accepted as authority,[5] it is plainly distinguishable in that the records there sought could not be characterized as impersonal, and, the *Cohen* court recognized,

> It is also settled that the production of such records [of a corporation or other impersonal organization] may be compelled even though a natural individual claiming privilege has acquired both possession and title. 388 F. 2d at 470-71 (citations omitted).

To paraphrase *United States v. Onassis*, 125 F. Supp. 190, 210 (D. D. C. 1954):

> The right of Mr. [Bellis] not to cooperate with the [government] in such manner as will assist in his prosecution is paramount. Yet the right of the [government] to prosecute for crime should not be hindered by theoretical infringements on individual's rights. The infringement must be real, and it is not real unless the documents are personal. There has been no real infringement here.

The asserted Fifth Amendment privilege must be denied.

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5. *See Egenberg, supra*, at 518. *Cohen*, however, may have been "rehabilitated" by *Couch, supra*, 41 U. S. L. W. 4110, n. 12.

The witness also asserts First, Fourth and Sixth Amendment claims. These claims, never explicated, must also be rejected.

Therefore, the order entered on May 10, 1973 was proper. By the terms of that order, the witness was directed to produce, on or before 12:00 Noon, Wednesday, May 16, 1973, those books and records called for in the subpoena, with the exception of any client case files. All financial records, as demanded by the subpoena will be produced. Any dispute over, misunderstanding of, or clarification of the scope of the order may be brought before this court at any time by either the witness or the government.

BY THE COURT:

DONALD W. VANARTSDALEN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISC. NO. 73-95.

IN RE: GRAND JURY INVESTIGATION.
ISADORE H. BELLIS, a witness.

ORDER.

VANARTSDALEN, *J.* June 29, 1973

AND NOW, this 29th day of June, 1973, this order is entered nunc pro tunc in accordance with a bench order entered and effective as of Wednesday, May 16, 1973 at 1:40 o'clock, P. M. it appearing that Isadore H. Bellis failed to comply with an order of this Court dated May 10, 1973 directing Isadore H. Bellis to produce before the Grand Jury sitting in this district certain books, records and documents on or before 12 o'clock noon, May 16, 1973, the Court hereby finds, adjudges and decrees that Isadore H. Bellis is in civil contempt of court, and therefore

Summarily orders and directs that Isadore H. Bellis be confined in a suitable place until such time as he is willing to produce the books, records and documents to the Grand Jury as required by the Order of this Court dated May 10, 1973, or for the term of the Grand Jury, including extensions thereof, whichever shall first occur. In no event however, shall confinement exceed 18 months.

This order is entered pursuant to 28 USC § 1826.

Isadore H. Bellis may at any time purge himself of this contempt upon producing said books, records and documents before the Grand Jury.

BY THE COURT:

DONALD W. VANARTSDALEN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Misc. No. .

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, a witness

NOTICE OF APPEAL.

Notice is given that Isadore H. Bellis, the above named witness, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment and sentence of contempt entered in this action on the 16th day of May, 1973.

LEONARD SARNER,
LOUIS LIPSCHITZ,
915 Robinson Bldg.,
Phila. Pa. 19102
Attorney for Isadore H. Bellis.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514

IN RE: GRAND JURY INVESTIGATION

ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

(D. C. Misc. No. 73-95)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued July 2, 1973

Before: SEITZ, *Chief Judge*, GIBBONS and HUNTER, *Circuit Judges.*

Louis Lipschitz, Esquire
Lipschitz & Danella
Leonard Sarner, Esquire
Attorneys for Appellant.

Peter F. Vira, Esquire
Thomas A. Bergstrom, Esquire
Special Attorneys, United States Department of Justice
Attorneys for Appellee.

OPINION OF THE COURT

(Filed July 9, 1973)

SEITZ, *Chief Judge.*

The district court found appellant in civil contempt and entered an appropriate order. Appellant appeals that order.

Appellant poses the following single issue:

> Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury Subpoena Duces Tecum, of financial books and records of the partnership in his possession.

Appellant Bellis was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." Appellant appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the district court to compel the appellant to produce the books and records described in the subpoena. The issue is limited, at least at this stage, to the production of documents.

A hearing was held before the district court on the government's contempt motion. The appellant confined his claim to his Fifth Amendment privilege. The district court ruled, inter alia, that since the documents were partnership papers, they were not subject to appellant's personal privilege. He thereupon ordered appellant to comply with the subpoena. The court excluded from its order, "any individual client files containing any advice and confidential

relationships between the attorney and attorney and client."

The appellant reappeared before the Grand Jury and on the advice of counsel repeated his refusal to produce the subpoenaed records, inter alia, on the same constitutional grounds. Thereupon the Government orally moved before the district court in the presence of appellant's counsel for a contempt order. Such an order was entered and this appeal followed.

Fortunately, the facts material to our disposition of this case are not in dispute. The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969. The partnership also had about six additional employees. Appellant was the senior partner and personally supervised the work of the bookkeeper. The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the appellant's possession.

The sole issue is whether an individual partner, assumedly in lawful possession of partnership records of a dissolved partnership, may refuse to produce such records on the ground that such production would violate his Fifth Amendment rights.

The judicial history of the privilege against self-incrimination is tortuous to say the least. But we are satisfied that it was not intended that the privilege was to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members. We say this because the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers. *United States v. White,* 322 U.S. 694 (1944). Since the subpoena and implementing order only directed the production of records of a partnership, certainly a separate

legal entity, it follows that their production would constitute no encroachment on the appellant's privilege with respect to his personal records.

We recognize that *United States v. White, supra,* seems to lay down a somewhat more involved test. However, we think our conclusion is consistent with the fundamental approach of that decision.

Appellant would have us distinguish between the records of a large, presumably impersonal, partnership and those of a small law firm. In this way he would distinguish our conclusion in *In re Mal Bros. Construction Co.,* 444 F.2d 615 (3d Cir. 1971). Not only is the distinction inconsistent with the dictum in that case, but more to the point, it would suggest a test which tends to ignore the fact that only the records of the separate entity are involved and loses sight of the personal nature of the privilege.

We think the district court correctly decided that the appellant was not entitled to assert a personal privilege with respect to the partnership records in his possession despite the modest size of the partnership entity.

The order of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514.

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

(D. C. Misc. No. 73-95)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and GIBBONS and HUNTER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 29, 1973 and entered nunc pro tunc as of May 16, 1973, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

July 9, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1514.

IN RE: GRAND JURY INVESTIGATION
ISADORE H. BELLIS, a witness,

ISADORE H. BELLIS,

Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been sumitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLINS J. SEITZ,

Judge.

Dated: July 20, 1973